United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

NO. 74-1471

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ANTHONY E. LIPANI,

Plaintiff-Appellant,

v.

BOHACK CORPORATION,

Defendant-Appellee.

ROBERT LOESCH,

Plaintiff-Appellant,

v.

BOHACK CORPORATION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

REPLY BRIEF FOR THE PLAINTIFFS-APPELLANTS

REX E. LEE,
Assistant Attorney General,

DAVID G. TRAGER,
United States Attorney,

ROBERT E. KOPP,
RICHARD A. OLDERMAN,
Attorneys,
Department of Justice,
Civil Division-Appellate Section,
Washington, D.C. 20530.
Phone: (202) 739-5325

OF COUNSEL:

WILLIAM J. KILBERG,
Solicitor of Labor,

DONALD S. SHIRE,
Associate Solicitor,

WILLIAM H. BERGER,
Attorney,
Department of Labor,
Washington, D.C. 20210.

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On Appeal from the United States District Court
for the Eastern District of New York

REPLY BRIEF FOR THE PLAINTIFFS-APPELLANTS

The appellants' opening brief in this case was filed on July 19, 1974. Shortly thereafter the appellee, Bohack Corporation, commenced bankruptcy proceedings. On July 30, 1974,

the Bankruptcy Court issued an order staying all judicial actions. This was followed, on August 23, 1974, by an order of this Court staying this particular appeal, but noting that appellants were not prejudiced from moving to vacate the stay in the event the Bankruptcy Court modified its order of July 30, 1974. The Bankruptcy Court did subsequently modify its order and, on September 22, 1976, this Court granted the appellants' motion to dissolve the stay. Appellee's brief was thereafter filed on October 29, 1976.

This reply brief is intended to answer several contentions made by the appellees in its brief, as well as to apprise the Court of recent significant developments in the law--particularly the Supreme Court's 1975 decision in Foster v. Dravo Corp., 420 U.S. 92--which, we submit, dictates reversal of the district court decision in this case.[1/]

1. Appellee asks this Court to uphold the district court decision and asserts that under the principles ennunciated by the Supreme Court in Foster v. Dravo Corp., supra, vacation and sick leave benefits must be denied to the veterans in this case. Its position, however, is without merit.

1/ It should be noted that the veterans' reemployment rights provisions of the Military Selective Service Act (50 U.S.C. App. § 459) were recodified into 38 U.S.C. § 2021, et seq. (Chapter 43) by P.L. 93-508, 88 Stat. 1578, on December 3, 1974, with non-substantive wording changes in those sections which are pertinent to this action. The pertinent provisions of the recodified Act are reproduced in the Statutory Addendum to this brief.

(a) In Foster, the Supreme Court was asked to decide whether veterans were entitled to vacation benefits when the governing collective bargaining agreement tied these benefits to a requirement that the employees work a minimum of 25 weeks in each calendar year. The Court began by reaffirming the principle, established in cases such as Accardi v. Pennsylvania R. Co., 383 U.S. 225 (1966), and concurred in by this Court in cases such as Palmarozzo v. Coca-Cola Bottling Co. of New York, Inc., 490 F.2d 586, 590 (C.A. 2, 1973), cert. den. 417 U.S. 955 (1974), that "a returning serviceman must be treated as if he had kept his job continuously through the period of his military service" (420 U.S. at 99). Turning specifically to the issue of vacation benefits, the Court ruled that a veteran's military service must be counted toward vacation benefits in his year of return and the year thereafter "where it clearly appears that vacations were intended to accrue automatically as a function of continued association with the company" (id. at 101). The Court held that it is only in those circumstances "where the work requirement constitutes a bona fide effort to compensate for work actually performed," that vacation benefits will be denied to returning veterans (id. at 99), and counseled against denying benefits in instances where the work requirement is "so insubstantial that it appears plainly designed to measure time on the payroll rather than hours on the job * * *" (id.). In examining the contract before it the Court ruled that the provision requiring a minimum of 25 weeks of work in each calendar year constituted

a "bona fide" work requirement; therefore, a returning veteran who did not fulfill the requirement was not eligible for a vacation.

(b) The Foster rationale, when applied to the collective bargaining agreement in this case, demands a reversal of the district court decision since vacation leave here is conditioned simply on the passage of time, and is thus a perquisite of seniority under Section 2021(b)(2) of the Act (38 U.S.C § 2021(b)(2)). Article X, Section A, of the bargaining agreement provides that 1 week of paid vacation is accrued after "six months of continuous working service" and that 2 weeks paid vacation are received after 12 months of service. The length of vacation thereafter increases with the number of years an individual has been in the employ of the company (A. 13a-14a). Vacations plainly are predicated simply upon the passage of time, and not upon days actually worked.

Significantly, the court below did not find, and the appellee does not now claim, that the Article X, Section A, requirement constitutes, in the words of the Supreme Court in Foster v. Dravo Corp., "a bona fide effort to compensate for work actually performed" (420 U.S. at 99). Rather, appellee relies primarily, at pages 9-10 of its brief, upon Sections B and C of Article X, which establish how vacation pay is to be computed once a vacation has been accrued. These provisions as to computation are, however, simply irrelevant to the question of whether a vacation is or is not accrued in the first place.

Additional proof that vacations are tied to continuous employment and not actual work is found in Section I of Article X which provides that "[t]ime not worked by an employee because of illness shall be considered time worked for the purpose of computing the vacation of an employee, provided such employee has worked a minimum of thirty (30) days during the year" (A. 8a). Moreover, time not worked because of official union business, jury duty, or work-related accidents is treated as time worked for vacation accrual purposes (A. 68a-69a). Certainly it cannot be argued that under these circumstances vacations are based on actual work performed. Cf., Nichols v. Kansas City Power & Light Co., 391 F.Supp. 833, 840-841 (W.D. Mo., 1975).

(c) The Supreme Court and several lower Federal courts have construed similar vacation provisions in collective bargaining agreements as being founded simply on the passage of time rather than establishing an actual work requirement. Thus, in Foster v. Dravo Corp., supra, the Supreme Court, in discussing its prior decision in Eagar v. Magma Copper Co., 389 U.S. 323 (1967), stated that the proviso in the collective bargaining agreement at issue in Eagar that "[a]n employee must have been on the Company's payroll continuously for three (3) months prior to the holiday in question" (Magma Copper Co. v. Eagar, 380 F.2d 318, 320 (C.A. 9, 1966)), was not a "work requirement" (420 U.S. at 98). Moreover, the Foster Court, in discussing the vacation provision in the case before it, contrasted "the conditions of eligibility for a vacation [with] the terms governing the length

of the vacation to which an employee is entitled" (id. at 101, n. 9). Eligibility had been found to be dependent on 25 full weeks of work. Length of vacation, on the other hand, increased "with the employee's length of 'continuous employment'" (id.). The Court made it clear, and the Dravo Corporation conceded, that the computation of length of vacation time must include time spent in the military because this was not based on a work requirement but, rather, on the passage of time (id.).

The lower Federal courts have also characterized vacation provisions similar to the one at issue here as being based on simple continuous association with a company and not actual work performed. Thus, in Locaynia v. American Airlines, Inc., 457 F.2d 1253 (C.A. 9, 1972), cert. den. 409 U.S. 982 (1972), a decision which the court below admitted "is directly contrary to our conclusion" (A. 62a), the Ninth Circuit awarded full vacation benefits to three veterans in their year of return (1967), even though they had all been in military service for the complete vacation accruing year (1966). The collective bargaining agreement in Locaynia, like the agreement in controversy here, based vacation eligibility on "continuous service" (457 F.2d at 1254, n. 2), with a reduction for leaves of absence in excess of 60 days (id. at 1255, n. 5). While Judge Hufstedler, who wrote the majority opinion in Locaynia, did not elaborate in that opinion upon the nature of the vacation requirement, she later stated in the subsequent vacation eligibility case of Austin v. Sears, Roebuck and Co., 504 F.2d 1033, 1034 (C.A. 9, 1974), that

"[t]he Sears collective bargaining agreement, unlike the contract considered in Locaynia, based eligibility for vacation benefits on actual work" (emphasis added). It is noteworthy that the decision in Austin placed considerable reliance on the Third Circuit's decision in Foster v. Dravo Corp., 490 F.2d 55 (C.A. 3, 1973), aff'd. 420 U.S. 92 (1975).[2/]

To the same effect is Ewert v. Wrought Washer Mfg. Co., 477 F.2d 128 (C.A. 7, 1973), where a "continuous employment" requirement was modified by an excess leave (90 days) requirement.[3/] The Seventh Circuit ruled that "the vacation rights under the contract in this case are perquisites of seniority" (477 F.2d at 129), and awarded vacation benefits to several veterans for their year of return from military service just as in Locaynia, notwithstanding that they too had not been at work for the entire accruing year.[4/] The Seventh Circuit in Ewert also expressly rejected the district court decision in Connett v. Automatic Electric Co., 323 F.Supp. 1373 (N.D. Ill., 1971), a decision relied upon in the instant case by the court below (A. 61a, 63a). (See 477 F.2d at 129.)

2/ Significantly, the Third Circuit in Foster stated: "[T]he collective bargaining agreement in Locaynia did not provide that a specified minimum amount of work was prerequisite to the employee's vacation benefits" (490 F.2d at 60-61).

3/ The provisions of the contract in Ewert are set out in the district court decision, 335 F.Supp. 512, n. 1 (E.D. Wis., 1971).

4/ The Third Circuit in Foster also viewed the contract in Ewert as not containing the type of substantial work requirement which must be met by a returning veteran in order to obtain vacation benefits for his period of military service (490 F.2d at 61).

Finally, in Aiello v. Detroit Free Press, Inc., 397 F.Supp. 1401 (E.D. Mich., 1974), rehearing den. 77 CCH Labor Cases ¶10,999 (June 25, 1975; not officially reported; copy attached), appeal pending C.A. 6, Nos. 76-1822 and 76-1823, the court held that a provision which predicated vacation accrual on various periods of continuous service "establishes no work requirement as a condition to vacation entitlement" (397 F.Supp. at 1406). In its Order denying Defendant's Motion for Rehearing, which had been stayed pending the Supreme Court's decision in Foster, the court stated that:

> [The] difference in the results reached is entirely a function of the differences between the collective bargaining agreements in the two cases. The agreement involved in the Foster case included a substantial work requirement upon which vacation benefits were conditioned. The veteran had failed to satisfy that work requirement. On the other hand, in our cases, the agreement contained no work requirement; vacation benefits accrue to employees in Plaintiffs' status merely by reason of their being in the continuous service of the Defendant [77 CCH Labor Cases ¶10,999 at p. 19,383].5/

We also note that the Sixth Circuit has adopted the view that vacation provisions of collective bargaining agreements "ought to be interpreted in the same way that settled industrial

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5/ Kasmeier v. Chicago, Rock Island and Pacific R. Co., 437 F.2d 151 (C.A. 10, 1971), another decision relied upon by the district court and by appellee is distinguishable to the same extent as is Foster. In Kasmeier, the court held that a 110-day work requirement had to be met for full vacation entitlement. Foster sanctions that result just as it sanctions the result appellants seek in the instant case.

practice interpreted others * * *" (Schneider v. Electric Auto-Lite Co., 456 F.2d 366, 371 (C.A. 6, 1972)). In this regard, we refer the Court to two representative arbitration decisions which have interpreted vacation provisions predicating vacation accrual on "continuous employment" (Crescent, A Division of Cooper Industries, Inc., 72-ARB ¶8217, April 25, 1972; copy attached) or "service with the Company" (Peterbilt Motors Co., 66 LA 160 (February 3, 1976; copy attached)). In both decisions the arbitrators ruled that the provisions do not mean that actual work must be performed during the year in order for an employee to receive a full vacation.[6/]

It is thus evident that in this case vacation benefits accrue with the passage of time, are not tied to a bona fide work requirement, and are therefore perquisites of seniority under Section 2021(b)(2) of the Act. Accordingly, the district court decision should be reversed.[7/]

6/ Included in the Record on appeal in Aiello v. Detroit Free Press, Inc., supra, is an arbitration award interpreting the vacation provisions of the collective bargaining agreement at issue there. In that decision, the arbitrator also ruled that a "continuous service" provision did not constitute a work requirement. A copy of that decision (pp. R-64 - R-72 of the Record on appeal) is attached hereto.

7/ Appellee relies at pages 10-12 of its brief upon this Court's decision in Straus-Duparquet, Inc. v. Local Union No. 3, 386 F.2d 649 (C.A. 2, 1967), for the proposition that "vacation pay * * * has been held by this court to be compensation for services rendered." Straus-Duparquet is, however, inapposite since it deals solely with vacation pay within the context of the Bankruptcy Act. While vacation pay may be classified as wages under the bankruptcy laws, that analysis is not controlling in veterans' reemployment rights cases. See e.g., United States v. Embassy Restaurant, 359 U.S. 29, 33 (1959).

2. Appellee asserts, erroneously, and the district court erroneously held, that vacation benefits cannot be awarded in this case because the collective bargaining agreement contains no provision for counting time spent by employees on leave of absence or furlough toward the accrual of a vacation. However, the courts have consistently held that in determining whether vacation benefits are perquisites of seniority, the controlling question is whether vacations are intended to accrue simply by virtue of continued association with the company. They have, at the same time, rejected the proposition that returning veterans are to be equated with other employees returning from nonmilitary leaves of absence.

This is the holding of the Fifth Circuit in Hollman v. Pratt & Whitney Aircraft, 435 F.2d 983 (C.A. 5, 1970);[8/] of the Eighth Circuit in Morton v. Gulf, Mobile and Ohio Railroad Co., 405 F.2d 415 (C.A. 8, 1969);[9/] and of countless district courts.

8/ In Hollman the company had contended that "an employer who denies a returning veteran vacation pay has not infringed upon his rights so long as he has treated the veteran precisely the same as he would have treated an employee on furlough or leave of absence for the same period of time that the returning veteran was in the service" (435 F.2d at 986). The Fifth Circuit rejected this argument and held that "[t]his proffered path, however, was barricaded by the Supreme Court in Eagar v. Magma Copper Co. [389 U.S. 323 (1967)], which was decided per curiam on the authority of Accardi v. Pennsylvania R. Co., 383 U.S. 225 * * * (1966)" (id.).

9/ In Morton the Eighth Circuit wrote: "It is urged that if another employee similarly situated to Morton had been on leave of absence from the Railroad rather than in military service for the same four years, he would not have performed 'compensated service' as defined by the collective bargaining agreement and

[Continued on next page]

See e.g., Dufner v. Penn Central Transportation Co., 374 F.Supp. 979, 989 (E.D. Pa., 1974); and the recent case of Aiello v. Detroit Free Press, Inc., supra, 397 F.Supp. at 1407.

This Court, as well as the Supreme Court, has consistently considered returning veterans as if they had remained at work during their military service in awarding them benefits protected by the Act even though nonveterans on furlough or leave of absence were not accorded the same privilege of counting time not worked toward fulfillment of so-called "work requirements." See e.g., Hatton v. Tabard Press Corp., 406 F.2d 593 (C.A. 2, 1969) (pay progression); Borges v. Art Steel Co., 246 F.2d 735 (C.A. 2, 1957) (pay progression); Accardi v. Pennsylvania R. Co., supra (severance pay); Palmarozzo v. Coca-Cola Bottling Co. of New York, Inc., supra (severance pay); Tilton v. Missouri P. R. Co., 376 U.S. 169 (1964) (position on seniority roster); Brooks v. Missouri P. R. Co., 376 U.S. 182 (1964) (position on seniority roster); Eagar v. Magma Copper Co., supra (vacation and holiday pay).

And, of course in Foster, the Supreme Court looked to the treatment of employees who remained at work, as opposed to

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9/ [Continued]

would have been entitled to more than ten days of vacation pay in 1966 and 1967. The issue here, however, is whether vacation pay is a seniority right under the statute. If so, Morton's service time counts; if not, Morton is to be treated as any other employee who had been on non-military leave" (405 F.2d at 417).

those on leave, to determine if the vacation benefits at issue were perquisites of seniority. It was only after deciding that the vacation benefits were not perquisites of seniority that the Court in Foster turned to the treatment of employees on furlough or leave of absence under the "other benefits" clause of Section 2021(b)(1) of the Act. (See point 4 infra at pp. 13-16.) The same approach is controlling here. It is clear, therefore, that appellee's contention that returning veterans must be treated exactly as civilians on furlough or leaves of absence is without merit and must be rejected.

3. Appellants Loesch and Lipani are also entitled to have the time they spent in the military counted toward sick leave credit. As we emphasized in our main brief (pp. 21-22), the only requirement for attainment of the full 10 days of sick leave for each year is that an employee must have "completed at least one (1) calendar year of employment" (A. 14a). There is absolutely nothing in the collective bargaining agreement to indicate that the accrual of sick leave credits is based on actual work. Significantly, the court below did not even analyze the issue of sick leave credits, nor did it give any basis for its conclusion that the plaintiffs were not entitled to the full benefits in their year of return from military service.

In addition to our discussion, supra, with respect to vacation benefits, we note that the court in Nichols v. Kansas City Power & Light Co., 391 F.Supp. 833 (W.D. Mo., 1975), held that the sick leave in dispute there "accrues as a result of

continual 'employment,' not work performed" (id. at 840). The court came to that conclusion in part because of the provision that "sick leave accrues during a 'sick leave or compensable injury absence'" (id. at 840-841). Not only does sick leave continue to accrue in the instant case while an employee is on sick leave or compensable injury absence, but also while he or she is off work on union business and jury duty (A. 68a-69a). Accordingly, appellants are entitled to full sick leave credit in the year of their return from military service.

4. Assuming arguendo that the vacation and sick leave benefits at issue here are not found to be perquisites of seniority under Section 2021(b)(2) of the Act, the plaintiffs are nevertheless entitled to have their military service time counted toward the accrual of these benefits by virtue of the so-called "other benefits" clause of Section 2021(b)(1) of the Act. That clause provides that a reemployed veteran "shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into [the Armed Forces] * * *."

Thus, while a court may not consider the status of those on nonmilitary furlough or leave of absence when making the determination under Section 2021(b)(2) of the Act as to whether the benefit at issue is a perquisite of seniority, once the determination is made that the benefit is not a function of continuous service, the "other benefits" clause of Section

2021(b)(1) of the Act comes into play. The court is then required to look to the employer's practices with respect to employees on nonmilitary furlough or leave of absence. If an employee on furlough or leave of absence is entitled to continue to accrue the benefit while he is on that furlough or leave, then a veteran is entitled to the same treatment.

As the Supreme Court stated in Accardi v. Pennsylvania R. Co., supra, 383 U.S. at 231:

> The Government contends that the "other benefits" clause of § 8(c) was added to the bill "for the express purpose of entitling employees to receive, while in service, such benefits as their employers accorded employees on leave of absence." The legislative history referred to in the Government's brief persuasively supports such a purpose [emphasis added].

Accord, Foster v. Dravo Corp., supra, 420 U.S. at 102, n. 10; Hoffman v. Bethlehem Steel Corp., 477 F.2d 860, 862 (C.A. 3, 1973); Barry v. Smith, 285 F.Supp. 801, 805-806 (D. Mass., 1968). See also Dufner v. Penn Central Transportation Co., supra. 10/

10/ In Dufner the court held:

> Protection as to insurance or other benefits * * * prohibits discrimination between those employees in military service and other employees who are on furlough or leave of absence. If the employer has "established rules and practices" with respect to insurance or other benefits, and these rules are applied evenhandedly to employees who leave active employment to enter military service, as well as to those who take leaves of absence or furloughs for other reasons, then the standard mandated by this clause of § 459(c)(1) has been met [374 F.Supp. at 988; emphasis added].

The principle that the "other benefits" clause mandates that the same treatment be given to veterans on military leave as is given to employees on nonmilitary leave was reaffirmed by the Supreme Court in Foster v. Dravo Corp., supra. Significantly, it was only after concluding that the vacation benefit at issue there was a form of deferred compensation and therefore not a perquisite of seniority under Section 2021(b)(2) of the Act, that the Court turned to the treatment of other employees on nonmilitary furlough or leave of absence under the "other benefits" provision of Section 2021(b)(1) of the Act. Because this issue was not litigated at the trial level, the Court remanded the case to the district court for a determination as to whether the veteran should receive pro rata vacation benefits to the same extent as employees on layoff (furlough) (420 U.S. at 102).

The district court on remand awarded pro rata vacation benefits to the veteran strictly on the basis that the collective bargaining agreement gave additional rights to employees who did not otherwise meet the work requirement for accrual of the benefit (395 F.Supp. 536). This comports with the statement of the Tenth Circuit in Kasmeier v. Chicago, Rock Island and Pacific R. Co., 437 F.2d 151, 153 (C.A. 10, 1971), that under the Act a veteran must be allowed to participate "in insurance and other benefits on terms at least as favorable as those provided by established rules and practices in effect [at the

time of his induction] relating to employees on furlough or leave of absence" (emphasis added).

In the instant case, employees on leave for union business, jury duty, and disability leave continue to accrue both vacation and sick leave benefits while on what apparently can be unlimited leave (A. 68a-69a). Moreover, an employee need only work 30 days in a year before (or after) going on sick leave to accrue full vacation benefits for that year (A. 8a).[11/] It is thus clear that there are extensive and pervasive opportunities for employees of defendant to continue to accrue vacation and sick leave benefits while on various leaves of absence. In these circumstances, the "other benefits" clause of the Act mandates that the same opportunities to accrue the vacation and sick leave benefits be afforded appellants who were on military leave in the service of their country.[12/]

11/ There appears to be a 26-week limitation as to a leave of absence for sick leave for the accrual of sick leave benefits (A. 68a-69a).

12/ The appellee also contends, in Point III of its brief, that even if the appellants have a valid claim to vacation and sick leave benefits, they are merely general creditors under the Bankruptcy Act and thus are not entitled to a secured claim against the appellee's estate. The argument is, however, irrelevant to this appeal. The issue before this Court is whether appellants have a claim at all. Once this Court has determined that appellants have a valid claim, it is for the Bankruptcy Court, which has plenary power in such matters (see 11 U.S.C. § 11(7); 11 U.S.C. § 104) to determine whether the claim deserves priority status.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our main brief, we urge the Court to reverse the judgment below.

Respectfully submitted,

REX E. LEE,
Assistant Attorney General,

DAVID G. TRAGER,
United States Attorney,

ROBERT E. KOPP,
RICHARD A. OLDERMAN,
Attorneys,
Department of Justice,
Civil Division-Appellate Section,
Washington, D.C. 20530.
Phone: (202) 739-5325

OF COUNSEL:

WILLIAM J. KILBERG,
Solicitor of Labor,

DONALD S. SHIRE,
Associate Solicitor,

WILLIAM H. BERGER,
Attorney,
Department of Labor,
Washington, D.C. 20210.

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November, 1976, I served the foregoing reply brief upon opposing counsel by causing two copies to be mailed, postage prepaid, to:

William M. Rifkin, Esquire
Shaw and Levine
770 Lexington Avenue
New York, New York 10021

Richard A. Olderman
RICHARD A. OLDERMAN
Attorney

STATUTORY ADDENDUM

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Title 38, United States Code, Section 2021, et seq. (Chapter 43--Veterans' Reemployment Rights), provides in pertinent part as follows:

§ 2021. Right to reemployment of inducted benefits protected

(a) In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act (or under any prior or subsequent corresponding law) for training and service and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year--

* * * * *

(B) if such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall--

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; or

* * * * *

(b)(1) Any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section shall be considered as having been on furlough or leave of absence

during such person's period of training and service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration or reemployment.

(2) It is hereby declared to be the sense of the Congress that any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section should be so restored or reemployed in such manner as to give such person such status in his employment as he would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment.

CASE ADDENDUM

issue under the duty of continuing his leave of absence (granted to him as a medical and/or industrial injury and/or occupational disability leave of absence) under the provisions of Article VII, Section 1 and that the Employer was prohibited by these said Contract provisions from changing his status to layoff in July, 1971 and halting payment on his behalf of welfare contributions commencing with August 1, 1971.

Unless the Employer's action in stopping health and welfare contributions finds justification in other facts and conditions establishing a past practice, it appears from the foregoing discussion and analysis that this action resulted in a violation of the collective bargaining agreement.

On the issue of past practice, an Employer's witness testified to the conclusion that it has been Friden's practice for some years to place medical leave employees on layoff when their seniority dates were reached in a force reduction. The Employer, however, produced no specific instances of having transferred *any* members of Local 128 from industrial leave to layoff. The only specific instance of such transfers was the transfer of several members of the Machinists Union from non-industrial medical leave to layoff in 1971.

There was no evidence that any responsible member of the Union involved in our case (Metal Polishers) ever was informed by the Employer, or otherwise knew, that, prior to the instant Grievance, the Employer had such a practice. Hence, even if the Employer's practice could be conceded longevity it here lacked the necessary mutuality which would cause it to ripen into a consistent past practice binding upon the Union and its members. There is no evidence in the record which would support a finding that the Company's action was to the Union such a well-known and mutually concurred in course of conduct that it resulted in a past practice which became part of the parties' Collective Bargaining Agreement. To the contrary there is uncontroverted evidence that the first instance which gave notice to the Union that the Employer was following any such practice was its notice of the facts of the present Grievance which were immediately used by the Union to challenge the Employer's action. Nor is there any evidence that, prior to the year 1971, the Employer, although it agreed to "continue as a *participating Employer* in the CMTA-IAM Trust Health and Welfare Plan as described in Appendix B", ever advised the trustees of this Trust that it was transferring employees from medical leaves to layoff and thus stopping its payment of premium contributions for these employees in contravention of the interpretive rules of the trustees as to the meaning of the here contested provisions of Appendix B which are identical to those contained in the language of the Trust instrument.

Finally, but primarily important, the Arbitrator does not find the Contract language on the issue herein to contain any ambiguity which could have allowed this claimed "past practice" of the Employer to have become an implied term of Jnt. Exh. #1. To the contrary, it is my finding, as before indicated, that the express language of the Agreement is so conclusive on this issue that it precludes the operation of any contrary practice; this procedure of declaring a medical leave employee surplus and placing him on layoff consequently must give way to these clear provisions of the Contract.

There is no evidence that the Union was aware of this claimed practice at the time of the last Contract negotiations, or before. Therefore, there was no duty on the Union's part to there challenge it. If, however, the Employer concluded that it had achieved this claimed "past practice", it should have recognized that the Contract language was a direct challenge to that right and it would be reasonable to expect the Employer to counter the challenge by incorporating in the Agreement (Article VII, Section 1, first paragraph) an express third contingency provision protecting its claimed right.

The evidence in the transcript, the parties' exhibits, the Post-Hearing Briefs and the cited Arbitration Decisions and the very able arguments of Counsel have been thoroughly reviewed and studied.

For the reasons set forth above and upon all of the evidence, the Award is as follows:

Award

It is found and concluded that the Employer violated the parties' Collective Bargaining Agreement (Jnt. Exh. #1) when it stopped making welfare contributions on behalf of [M.] commencing with August 1, 1971, and as the remedy for such violation the Employer is obligated to provide such welfare contributions benefits as required by Article VII, Section 1 and Appendix B, Section 3(b) 4 as interpreted by this Decision and Award. It is believed that the parties can easily ascertain the amount and extent of the Employer's said obligation hereunder; the Arbitrator, however, retains jurisdiction for the sole purpose of resolving any controversy which may develop in this regard.

[¶8217] CRESCENT, A DIVISION OF COOPER INDUSTRIES, INCORPORATED and INTERNATIONAL

ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LODGE 1551

SAMUEL KRIMSLY, Arbitrator, appointed by the parties. Falconer, New York, April 25, 1972.

Vacations—Contract Interpretation—Eligibility Following Recall—Continuous Employment

Employees laid off during a vacation year and recalled prior to the end of that year were awarded full vacation benefits for the year. The company contended that the employees were not entitled to any vacation benefits because they had not worked continuously during the year, and, further, that it should not be required to compensate employees for time they had not worked. The company's argument of continuous service was based on a heading included in the vacation provisions of the contract. Here it was found that the vacation provision, which based an employee's eligibility on continuous employment, controlled. The contract did provide for pro-rated vacations for certain situations, but the situation in question was not one of them. Therefore, the arbitrator held that the contract provided that employees who were recalled prior to the end of the vacation year were entitled to full vacation pay based on their continuous employment.

Alan Riedel, Vice Pres. of Industrial Relations, and General Counsel; for the Company. Joseph H. Mason, Bus. Rep.; for the Union.

[Text of Award]

KRIMSLY, Arbitrator; PRELIMINARY STATEMENT: The Company, Crescent, is a division of a large corporate entity and is engaged in the manufacture of tools. The Company and the Union have had a long history of bargaining culminating in the current written collective bargaining agreement dated May 26, 1971, effective from May 24, 1971 through May 17, 1974.

The matter in arbitration involves an interpretation of Article IX Vacations of the Contract. The parties agree there is no past practice which may be cited as a tool of interpretation. Factually, the issue arose as follows:

The "vacation year" under the Contract runs from June 1 to June 1. Some members of the unit were laid off during the vacation year of June 1, 1970 to June 1, 1971 and were recalled prior to June 1, 1971.

On July 19, 1971, the Union filed the following grievance:

"We feel the Company is in violation of the contract 9-5 pro rated vacation payment for employees recalled to work on or before June the first. Any employee who was recalled by June 1, 1971 is entitled to full vacation pay under the Contract. Any employee that did not receive full payment should be fully compensated."

The grievance was answered as follows:

"The Company contends there was a definite understanding on Article 9.5 between the parties in discussions during the last contract negotiation. The principle of pro-rated vacation pay as applied to laid off employees was confirmed, but it was verbally agreed that employees who worked during the qualifying year, but had prolonged absence due to occupational or nonoccupational disability would not have their vacation pay reduced by pro-ration."

This grievance was negotiated by the parties without settlement and was submitted to arbitration. Samuel Krimsly was privately selected by the parties to arbitrate the issue. A hearing was held at Falconer, New York on March 8, 1972 at which the parties were afforded opportunity to present all pertinent evidence by way of testimony or exhibit. The proceedings were transcribed, and the Transcript was supplied to the arbitrator. The parties also filed post hearing briefs.

At the hearing, the parties stipulated that the matter was properly before the arbitrator. The parties proceeded on the basis similar to a case stated and informed the arbitrator that there was no essential dispute on facts, and what was desired was an interpretation of Article IX Vacations of the Contract. The only factual matter discussed was the possibility of an oral agreement on the issue as alluded to in the Answer to the Grievance. The Union denied any such agreement, and the Company took the position throughout that any pro-rated vacation pay granted was by way of gift and has specifically requested the arbitrator to find that it has no legal duty to make any such payments.

Contract Provisions

"Article IX

"Vacations

"9.1 The Company in conformity with established practice endorses the principle of vacations and believes that such vacations should be devoted to leisure, recreation and healthful exercise and that gainful employment during this period should be discouraged. In conformity with such policy the Company agrees that a vacation shall be granted on the following basis:

"Continuous employment as of June 1st of vacation year

	Vacation pay	Vacation time off
"6 months but less than 1 year	25 hrs.	3 work days
"1 year but less than 3 years	50 hrs.	1 week
"3 years but less than 5 years	75 hrs.	8 work days
"5 years but less than 10 years	100 hrs.	2 weeks
"10 years but less than 15 years	130 hrs.	3 weeks
"15 years but less than 20 years	150 hrs.	3 weeks
"20 years but less than 25 years	175 hrs.	4 weeks
"25 years and above	200 hrs.	4 weeks

"9.2 The basis of computation of such vacation pay will be the number of hours times the average straight time hourly earnings for the employee in the first quarter of the current year, increased by the amount of any change in wages made that year as defined in section 8.4.

"9.3 The Company shall have the right, in its discretion, of designating any two weeks for vacation shutdown or, in lieu of such shutdown, such vacation allowance will be paid in addition to regular pay for time worked. If the Company elects a vacation shutdown it shall be scheduled between June 27th and September 1st of the vacation year and the Company shall give the Union at least sixty (60) days notice prior to June 1st if a shutdown is to be scheduled.

"9.4 Any employee may take his added vacation at a mutually convenient time during the twelve month (12) period prior to the following June 1st. Vacation pay earned up through 100 hours' pay will be distributed during the week preceding the two-week vacation shutdown. Employees entitled to additional vacation pay will be paid at a time of their choosing, provided two weeks' written notice is given the Company. This vacation pay shall be in a separate check with only money due for vacation pay.

"9.5 An employee who, on or after December 1st of the vacation year, terminates employment or who is laid-off for lack of work (and not recalled to work prior to the succeeding June 1st) shall be entitled to a pro-rated vacation allowance. The pro-rated allowance shall be based on the period of service which the employee has completed as of his last day worked, and the vacation pay which the employee would qualify for on June 1st be reduced by 1/12 for each month prior to June 1st which the employee did not work in its entirety. A pro-rated vacation allowance shall be paid to the proper beneficiary of a deceased employee.

"The basis of computation of such vacation pay shall be the employee's average straight time hourly earnings for the last thirteen (13) weeks prior to termination.

"Payment of pro-rated vacation allowance shall be made at such time as regular vacations are payable, except that in the event of a termination of employment, payment shall be made, if reasonably possible, with the employee's pay earned the last day worked.

"9.6 A holiday which falls within an approved vacation period, other than a holiday occurring within the vacation shutdown period, will, if the employee desires, extend the

vacation time off by as many days as there are holidays within the vacation period."

Discussion

There is an old legal maxim: Close cases make bad law. It was never more applicable than in the present case. The parties are totally polarized on this issue. The decision I must make in the case will, of necessity, be hard on one side or the other. It will be seen that men laid off during any single vacation year and recalled prior to June 1 must be held entitled to full vacation pay or none at all. The Company has specifically requested a decision that no pay is required and has assured the arbitrator that it will continue its practice as initiated here of giving pro-rata pay. The Union insists on full vacation pay as a right under the Contract.

It is sincerely regretted that the parties were unable to resolve this issue, especially in view of the fact that the arbitrator's past experience with these parties has shown them to be a prime example of collective bargaining in the highest sense of the word. This case is illustrative, however, of the value of arbitration in the collective bargaining process because no matter how well a Union and Company can work together conditions may arise, as here, where both parties must sincerely insist on their rights under the Contract and feel that a compromise would be a failure of proper representation of their respective positions. I believe it is the duty of the arbitrator in such a case, to put aside his personal sense of "what *should* be" or "what *I* would do" and render a decision based on his interpretation of the Contract as the parties signed it. I do not have the authority to amend the parties' Contract according to my personal tastes, and while my decision is one I do not like viscerally, I believe it is required under the factual situation of this case.

Article IX Vacations is composed of six sub-sections numbered 9.1 through 9.6. While I have quoted all sub-sections, 9.2, 9.3 and 9.6 do not enter into my discussion of this case. 9.2 is limited solely to the method of computation of pay and not to the entitlement of vacation; and 9.3 and 9.6 refer solely to plant shutdown and holidays and not to basic entitlement of vacation. 9.4 is discussed only for certain oblique references proposed as interpretative of 9.1 and 9.5.

Section 9.1 sets forth the basic provisions by which an employee is entitled to vacation pay and sets forth the quantity subject to the computation process in 9.2. If an employee is entitled to vacation pay under 9.1 he is entitled to the full quantity unless restricted elsewhere. 9.5 provides such a restriction. If an employee falls under the descriptive terms of 9.5, he is entitled to receive a pro-rata vacation allowance.

Section 9.5 is explicit in its terms:

"An employee who, on or after December 1st of the vacation year, terminates employment or who is laid off for lack of work (and not recalled to work prior to the succeeding June 1st)..."

The problem herein concerns employees who were on layoff and who were called back *before* the succeeding June 1st. By definition, these employees cannot be included in paragraph 9.5.

There is no other pro-rata provision in the Article. It should be noted that the section does *not* read "An employee not working such as one laid off or terminated"; nor does it read "An employee who has not worked continuously during the vacation year..." There can be no doubt that the categories of employees affected by 9.5 are explicitly set out. By being so explicit in creating the class entitled to pro-rata vacation, the parties thereby exclude all other classes. Therefore, an employee who has lost work for any reason other than termination or layoff resulting from lack of work must look to 9.1 only to determine if he is entitled to vacation pay. If he falls under 9.1 he will receive the full amount. If he does not, he receives no vacation pay.* It therefore becomes apparent that the class of workers involved in the grievance must look to 9.1.

The disagreement arises under the interpretation of the language "Continuous employment as of June 1st of vacation year." This language appears once in the Article. The Company construes the language to mean working on the job during the vacation year. The Union construes the language as being synonymous with seniority.

I have searched the parties' Contract and the language "continuous employment" is not used elsewhere. The only similar use is under Article XIII, Severance Allowance, where the term "Continuous Service" is used.

I believe the most important factor to determine our issue is the location of the language. Examination will show that it is not a sentence, is not in paragraph form and does not, in and of itself, create a class or category of employees. The language "Continuous employment as of June 1st of vacation year" is a column title or heading. The classification of employee must be determined by selecting one of the various groups within the column. Therefore, the operative creator of the class is the column itself. If we examine the column, we find it refers to different groups of employees separated by length of employment: "6 months but less than 1 year" ... "10 years but less than 15 years" etc. Since the language to be interpreted is the heading of a column of groupings obviously based on Seniority, I must

find the column heading to bear a meaning consistent with the column itself.

This view receives some degree of corroboration when we look at Section 13.7 which reads as follows:

"13.7 The amount of severance pay shall be as follows:

"Continuous Service	Weeks Severance Allowance
"Less than 2 years service	0
"2 years but less than 3	2
"3 years but less than 5	3
"..."	

The language here is "Continuous Service" rather than "Continuous Employment" however the groupings relate to seniority and in neither 9.1 or 13.7 is the word Seniority used.

To follow the Company's interpretation, I would have to read into the column heading the same effect as adding a separate sentence reading: "To receive vacation pay the employees in the various categories must also have been at work continuously during the vacation year." I believe this goes more to altering the Contract than adopting the Union's view that "Continuous employment" means seniority.

The Company gives many cogent arguments. It cites examples whereby recalling a man before June 1 could result in granting a full year's vacation rights for very little actual work. It further cites authorities to the effect that vacation is payment for work received and an integral part of the wage structure. Under most situations, I would agree; however, *the parties may contract otherwise.* The individual case must be examined. The Company's argument here is, however, not consistent. On page 9 of the Company's brief, it states:

"Clearly under the contract language, an employee laid off *prior* to December 1, even though recalled before June 1 of the succeeding year, is entitled to no vacation since he does not meet the *dual* requirements of 9.5. The Company has, and will continue, as a matter of fairness to pay such employees pro rata vacation pay but is not required by the contract to do so..." (Emphasis in original).

If we apply the Company's argument, it means that as a matter of *law* the employees are entitled to nothing. Therefore, they would be denied the integral portion of the wage structure it says the employee is entitled to. The Company argues that to give vacation without work would not make sense since vacation pay is only another form of compensation for work performed. To bolster this argument, the Company refers to "vacation pay earned" in Section 9.4. This argument is, however, a two-edged sword, for if I find that grievants are entitled to no wages as requested by the Company, it makes no more sense to say the Union agreed the men would not be paid for the work they did. Thus, "vacation pay earned" means *in accordance with the contractual requirements.* Thus, if a man is entitled to no vacation, there is no "vacation pay earned"; and if he is entitled to full quantity of vacation, such would be "vacation pay earned." In each case, "vacation pay earned" does not refer to amount of work performed unless such is a requirement under 9.1.

The Company's statement of intent to pay pro-rata vacation though not obligated cannot come into my decision. It is not contractual and would be, at best, an offer not accepted by the Union. I, as arbitrator, have no authority to accept such an offer on the Union's behalf.

While the Company's argument that vacation pay is usually compensation carries much merit, vacation pay is different than wages. It is a fringe benefit, and as such, unless the contract so provides, cannot be calculated as specifically as wages. By way of example, no one in this case ever proposed that in determining a man's vacation who might have 15 years but less than 20 years seniority, his time would be reduced by layoff time at any time in the past. The only proposal put forward was reduction of "continuous employment" during the vacation year. Since the language is used as a heading for a list relating obviously to seniority, the words "as of June 1st of vacation year" cannot be changed to read "during the vacation year" without twisting the ordinary meaning in relation to its context in the paragraph.

Conclusion

The words "Continuous employment as of June 1st of vacation year" is a heading for a column referring to matters of seniority and refers to such concepts. By providing for pro-rata vacation pay under specific requirements in explicit language, the parties exclude pro-rata pay in all other circumstances. Any claimant under the grievance who meets the qualification for vacation pay under 9.1 who was on layoff during the vacation year and recalled prior to June 1 at the end of the vacation year, is entitled to the full quantity of period being included in the calculation formula.

Award

The grievance is sustained. Any member of the bargaining unit on layoff at any time during the vacation year and recalled prior to June 1 at the end of said vacation year shall have the full quantity or period of vacation pay as stated in Section 9.1 utilized in the calculating formula. By way of example: An employee on layoff at any time from June 1,

1970 and was recalled prior to June 1, 1971 and who had 5 years but less than 10 years seniority would receive 100 hours vacation pay as computed under Section 9.2; further, he would receive 2 weeks vacation time off.

— Footnote —

*9.5 does provide one additional category, deceased employee, which is not germane to our discussion.

[¶8218] METALCRAFT PRODUCTS COMPANY and UNITED FURNITURE WORKERS OF AMERICA, LOCAL 1010

WILLIAM LEVIN, Arbitrator, appointed by the parties. May, 1972.

Safety—Protective Clothing and Equipment—Eye Protection Program—Management Rights

Although a company's unilateral enforcement of a mandatory eye protection program was found to be reasonable, the company could not require employees to bear part of the cost of the program. The union claimed that the company violated its agreement when it unilaterally implemented the program, and argued that the rule was unnecessary and interfered with the employees' work. The company insisted that it had the right and the responsibility to introduce and enforce safety rules. It also insisted that it was reasonable to request employees to pay for the cost of prescriptions for safety glasses, which were provided by the company. The arbitrator held that the program was reasonable and could continue, but he took exception with some of the policies of the program. He held that the company should re-pay wages to and remove disciplinary actions from employees affected by the company's enforcement during the first two weeks of the program, that the company should re-pay employees for the cost of obtaining a prescription, and that those aspects of the program that resulted in additional costs to employees should be subject of negotiations.

Robert F. Walker, Jr. of Paul, Hastings, Janofsky and Walker, for the Company. Richard J. Silber of Silber, Schwartz and Benezra, for the Union.

[Text of Award]

LEVIN, Arbitrator; ISSUE: The issue was the following:

Did the Company's eye protection program and its enforcement of the program violate the Collective Bargaining Agreement? If so, what remedy, if any, is appropriate?

Collective Bargaining Agreement and Bargaining History

The following provisions were cited:

A. *Contract Provisions*

1. The employer's "sphere of activity", as set forth under the "Purposes" of the Agreement, consists of:

"... decisions as to standards of quality of its products, procurement of supplies and materials, sales prices, the planning of production and delivery schedules, and the supervision of its personnel and property."

2. Article VII sets up classes of offenses in terms of "violation of any of the following shop rules" as just cause for discharge. A Class C offense is:

"(d) Endangering the health and safety of any employee by violation of a safety rule or safety practice."

An employee is subject to discharge "if the violation occurs three times within any six-month period" for a Class C offense.

3. Article XIII A provides:

"No employee shall be required or permitted to perform any work for which he is not qualified or to work under conditions which may be, or tend to be unsafe or injurious to health."

4. Article XIII E provides:

"This constitutes the entire agreement between the parties, and all agreements heretofore made between the Employer and this Union or any other union are hereby cancelled, this Agreement taking the place therefor. All agreements in the future shall be made between the Employer and Union with respect to conditions of employment. The Employer will not attempt to make any agreement with any employees contrary to the terms hereof. The Employer may make such arrangements for compensation in excess of the minimum rates herein set forth as may be desired by mutual agreement. The normal practices for the comfort and well being of all employees that were previously in force shall remain."

5. Article XIII O provides:

"All employees may wear gloves or such other protective equipment as is mutually agreed upon."

B. *Bargaining History*

The Union offered testimony that in the 1971 negotiations, the Company sought the following language in the "Purposes" clause to define the employer's "sphere of activity":

"The Employer's sphere of activity consists of the usual and traditional management functions involved in the management of the business and the direction of the working forces including, but not limited to the right to plan, direct and control operations, to schedule working hours, to introduce new and improved production methods, materials, or facilities or to change existing production methods or facilities, to manage the plant, to hire, promote, demote and transfer employees, to suspend,

(UX-1) and in November 1975 it was 165.6 (UX-2), an increase of 25.9 points or approximately 18.4%. Since the December 1975 figure will not be published until after this award is received, I shall estimate the December figure and use an increase in the cost of living of 19.2% in my deliberations. It must be recalled that many labor contracts put a limit on this type of increase.

It is my opinion that the devaluation of the purchasing power of the dollar is reflected in the cost of items included in the cost of living index and should not be a factor in this award.

The latest B.N.A. statistic on deferred wage increases falling due in 1976 is up 10.2¢ over 1975.

I recognize the Union's statement that the Wingus contract was its first and substantial wage increases were negotiated, and that the Harrod-Carter (sp?) contract expires March 1, 1976.

I further recognize the Company's economic arguments and its need to stay competitive (its rates are already 2¢ higher than Harrod's (sp?). The need to stay competitive is equally important to its employees.

AWARD

After considerable research and study, I find that each wage rate at the W. T. Congleton Co. shall be increased by 33¢ an hour effective January 1, 1976, and it is so ordered.

PETERBILT MOTORS CO.—

Decision of Arbitrator

In re PETERBILT MOTORS COMPANY (Madison, Tenn.) and UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 1832, FMCS Case No. 76K/02999, Grievance No. CT-1595, February 3, 1976

Arbitrator: Ralph Roger Williams, selected by parties through procedures of Federal Mediation & Conciliation Service

VACATIONS

—Vacation allowances—Computation—Time not worked ▶ 116.1554

Employer improperly failed to credit vacation allowance to employee for time that he was on layoff under contract provision entitling employees to specified vacation depending on number of "years of service" with employer, since contract provision is clear in establishing "years of service" as determining factor in computing vacation without regard to time not worked. Fact that contract specifies that paid sick leave shall not be considered time off work for purposes of computing vacation does not establish that layoff time is to be treated differently.

Appearances: For the company — Arthur E. Thomas, assistant counsel, employee relations; Gene R. Kieffaber. For the union—Raymond E. Shetterly, director of arbitration services, Detroit, Mich.; Ray Casteel, international representative; Danny Warren, local president; Larry Gregory, Thomas J. Brazofsky, Terry Huckaby, and Bobby R. Ramberth, committeemen.

VACATION ALLOWANCE

WILLIAMS, Arbitrator: — This grievance, filed July 1, 1975, by Grievant Arthur O. Clarke, requests an award requiring the Company to revise the Grievant's vacation record to indicate that he is due 36 vacation hours to correspond to his anniversary date, and also requests that the Company not pro-rate vacations due to recent layoffs in the plant. The grievance states:

I, Arthur Clarke, contend that the Company owes me 16 hours vacation more than they advised me of. During the Christmas holiday of 1974, I took 4 days or 32 vacation hours. I was laid off on January 23, 1975, and I was paid 3 days and 4 hours, or 28 hours of vacation time. Therefore at the point of layoff I had received 60 hours of vacation. After returning to work on April 10, 1975, I was advised I had only 20 hours of vacation earned and due me. I contend that for the time I was laid off, which was from 1-23-75 to 4-10-75, I should have been earning vacation time as if I were at work. This would amount to 16 hours. I contend that the Company wrongfully pro-rated my vacation hours due to my lay-off status."

The Company denied the grievance, contending that Grievant's vacation was properly computed, that an employee's yearly vacation is prorated according to the number of months of active employment within the year next preceding the employee's anniversary date, that the Grievant was not actively employed during the months of February and March 1975 and that, therefore, his vacation eligibility amounts to 10/12 of his normal vacation. (The 2/12 represents 13.4 hours and not 16 hours as indicated in the grievance).

At the arbitration hearing duly

held January 14, 1976, at Nashville, Tennessee, the parties agreed that the grievance was timely filed and arbitrable, and expressed the issue to be as follows: Does the Company have the contractual right to deduct a pro-rata amount of vacation for the month or months in which the employee has not worked? Or, stated with specific reference to this case: Is Grievant Clarke entitled to be paid for 2/12ths of 80 hours (13.4 hours) which the Company deducted from his vacation because he performed no work for the Company during the months of February and March, 1975? The grievance thus presents the issue whether vacation is related to time worked, or whether it is strictly a matter of seniority.

The basic facts are not in dispute. Grievant's seniority dates from June 21, 1971, his "anniversary date" therefore being June 21. He was on layoff from January 24, 1975, until April 10, 1975. When he went on layoff January 24, 1975, the Company gave him 46.6 hours of vacation, being 7/12ths of 80 hours prorated for the seven-month period from his anniversary date (June 21) to the commencement of the layoff (January 24). On his anniversary date, June 21, 1975, the Company gave Grievant 20 hours of vacation, being 3/12ths of 80 hours, for three months worked (April May, June), a total of 66.6 hours. Thus, he received no vacation for the two unworked months, February and March.

Article 11 of the Agreement is the vacation article, and provides in pertinent part as follows:

ARTICLE 11
VACATIONS

11.01 All employees shall receive vacation benefits as follows:

(a) Those with one to two years' service with the Company on their anniversary date shall be entitled to one week's vacation with straight time pay based on forty hours, but not including overtime and night shift premium.

(b) Those with two years' or more service with the Company on their anniversary date shall be entitled to two week's vacation with straight time pay based on eighty hours, but not including overtime and night shift premiums.

(c) Those with seven years' or more service with the Company on their anniversary date shall be entitled to three weeks' vacation with straight time pay based on one hundred and twenty hours, but not including overtime and night shift premiums.

(d) Those with twenty years' or more service with the Company on their anniversary date shall be entitled to vacation pay equal to one-hundred and sixty (160) hours at straight time pay rate, but not including overtime and night shift premiums.

(e) An employee who has completed less than one year's service during the vacation period, but who will have completed one year's service before the end of the same calendar year, shall be entitled to take one week's vacation time off during the vacation period but shall receive no pay therefore until the first anniversary of his employment.

(f) An employee who has completed one year but less than two years' service during the vacation period and who will have completed two years' service before the end of the same calendar year shall be entitled to take two weeks vacation time off during the vacation period, but shall receive no pay for the second week until the second anniversary of his employment.

11.03 After the completion of one year's service, an employee temporarily laid off or who separates from the employ of the Company for any reason other than discharge for just cause, is entitled to one twelfth (1/12th) of his vacation allowance for each month or part thereof which he has served since his last employment anniversary.

(a) An employee who is discharged for just cause is not eligible for vacation benefits computed under 11.03.

(b) An employee who is laid off shall be paid vacation benefits computed under 11.03 at the time he is laid off.

(c) Paid sick leave shall not be considered time off work for the purpose of computing vacations.

(d) Pro-rated vacation benefits computed under 11.03 cannot total more than twelve-twelfths (12/12ths) in any one year period.

Opinion

Vacation rights are creatures of contract, being unknown to the common law governing employer-employee relationships. The parties to this grievance are bound by Article 11 of their Agreement in matters involving employee vacations.

Grievant has between two and seven years' service with the Company; therefore, his vacation entitlement is governed by Paragraph 11.01 of Article 11, which provides, "Those with two years' or more service with the Company on their anniversary date shall be entitled to two weeks' vacation with straight time pay based on 80 hours, but not including overtime and night shift premiums." Paragraph 11.01 provides that all employees shall receive vacation benefits on the bases listed therein; there are only two requirements: (1) that the person be an "employee," and (2) that he have two years' or more service with the Company on his anniversary date. The meaning of "service" will be discussed infra.

No justification appears in the Agreement to decrease an employee's vacation pro-rata in proportion to any time he has not worked. Paragraph 11.01 establishes the criteria on the basis of years of service with the Company, without reference to time not worked.

Paragraph 11.03(c) provides, "Paid sick leave shall not be considered time off work for the purposes of computing vacations," but this does not, by inference or otherwise, mean that time on layoff is to be considered time off work for purposes of computing vacations. Paragraph 11.03(c) refers only to sick-leave situations, and has no general or presumptive application to Paragraph 11.01 situations not involving sick leave. If the parties had wished to consider time on layoff for the purpose of computing and prorating vacations, they should have included such a provision in their Agreement. It was not done, expressly or by inference, by Paragraph 11.03(c). General contract provisions are not altered by other specific provisions which essentially address themselves to a limited or different subject matter. A proviso or limitation should be clear and precise, and should be physically adjacent to the provision to be affected by it. To say that paid sick leave is not considered "time off work" when vacations are computed, is not to say that the time an employee is on layoff is considered "time off work" when vacations are computed, so as to justify proration of vacation rights. Paragraph 11.03(c) controls insofar as sick leave is concerned; paragraph 11.01 is silent with respect to any and all time not worked, and is therefore subject to interpretation as required by this grievance.

The phrase "two years' or more service with the Company" as used in Paragraph 11.01(b) of the Agreement, means two years or more as an employee, without regard to whether work was actually performed during each day, week, or month of those years. Paragraph 11.01(b) creates vacation rights without regard to any intervening events which do not toll or delay the running of the two or more years' of service time.

AWARD

The grievance is allowed. The Company has no right under the Agreement to deduct a pro-rata amount of an employee's vacation for months in which the employee did not work. Grievant's vacation rights are controlled by Paragraph 11.01(b) of the Agreement, unaffected by Paragraph 11.03(c) thereof, and he is awarded 13.4 hours of vacation hours and pay at the appropriate rate.

EASTERN CONSOLIDATED COAL CO.—

Decision of Arbitrator

In re EASTERN CONSOLIDATED COAL COMPANY, FEDERAL NO. 2 MINE [Fairview, W.Va.] and an Individual Grievant, February 3, 1976

Arbitrator: Martin Lubow

DISCIPLINE

—Insubordination — Personal problem factor — Relevance ▶118.658 ▶118.655

Employer properly suspended mine worker for insubordination for refusing to move four 50-pound rockdust bags on wheelbarrow on which he previously moved eight bags of same weight, despite fact that employee "felt" that heavy work that he performed during first half of his shift, together with some personal problem arising from illness of his one-year-old daughter, rendered him unfit to move 200 pound weight. Employee had physical capacity to do assigned work, and if he was unable to perform work after working one-half day, he should have asked supervisor to be excused from working the balance of shift.

GRIEVANCES

—Timeliness — Applicable contract provision ▶93.4665

Grievance protesting five-day suspension with intent to discharge employee that employer unilaterally reduced to two-day suspension is timely under contract provision giving aggrieved party 15 calendar days to file grievance from date he reasonably should have known of grievance, with which employee complied, notwithstanding separate contract provision providing aggrieved employee with only five days to file grievance in protest of suspension with intent to discharge.

INSUBORDINATION

I. Nature of the Case

LUBOW, Arbitrator:—This case involves the suspension with intent to discharge and subsequent reduction to a two day suspension of employee C—, and also the applicable time limits for filing a grievance under the applicable contractual provisions.

May 19, 1969

In the Arbitration between:

Vacation Pro Rata Grievance

The Detroit Free Press
Detroit, Michigan

and

Newspaper Drivers and Handlers
Local Union No. 372,
International Brotherhood of Teamsters,
Chauffeurs, Warehousemen and Helpers of
America

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OPINION EXPLAINING DECISION BY GABRIEL N. ALEXANDER, ARBITRATOR

Introduction

This matter comes to arbitration before me by arrangements made between the captioned parties. A hearing was held at Detroit, Michigan on January 22, 1969 at which the Publisher and the Union appeared and presented evidence. Arguments were submitted in Post Hearing Briefs. Appearing for the Union is Gerry Miller (Goldberg, Previant & Uelmen) Attorney, Milwaukee, Wisconsin. Appearing for the Publisher is Lawrence Wallace, Labor Relations Manager.

Statement of the Case

Local 372 represents a bargaining unit which includes persons employed by the Free Press as Division Supervisors, Streetmen, Promotionmen, Stationmen, Drivers, Jumpers, and others. It has executed Collective Bargaining Agreements with the Publisher covering that Unit for at least the following two-year terms: 1965-67, 1963-65, 1961-63, 1959-61, 1957-59, 1955-57, 1953-55.

Local 372 also represents a Bargaining Unit of persons employed at the Detroit News. It also had successive collective bargaining agreements with the News, the most recent expired one having been for the period 1965-67.

The 1965-67 contracts at both the News and Free Press having expired, on November 15, 1967 at midnight Local 372 struck the News, but not the Free Press. Two days later on November 17, 1967 the Free Press issued the following notice of suspension of publication and employment (Exhibit 10 Joint).

"NOTICE TO ALL EMPLOYES:

"Due to actions taken by certain Unions and their members, the Free Press, effective November 17, suspends publication.

"Except for a limited number of employees who will be notified, there is no work available for you to perform.

"Therefore, you are hereby notified that until further notice, you are no longer required to report for work, and your compensation ceased with the completion of your last day worked.

"This is not a notice of termination of your employment relationship with the Detroit Free Press, but is only notice of a period during which there is no work to be performed.

"When normal operations are resumed and there is once again work for you to perform, you will be notified.

"THE DETROIT FREE PRESS

"General Manager"

By February 15, 1968 Local 372 and the Free Press reached an understanding with respect to the terms of a new contract, but a written settlement agreement was not signed until June 18, 1968. Moreover the employees in Local 372's unit were not called back to work until August 8, 1968. Other Unions had struck or been locked out at the Free Press or the News in the meantime, and it was not until that date in August that all such interruptions were terminated and both daily papers resumed publication.

At no time prior to June 18, 1968 did spokesmen for the Free Press discuss with spokesmen for Teamster Local 372 any aspect of how vacation pay for the years 1967 and 1968 would be paid to employees represented by Local 372. However on June 19, 1968, in response to an inquiry by Union representatives, the Publisher made known that for the base year 1967 it intended to pay only a portion of the full amount normally paid, the portion being in the ratio of the number of weeks worked by employees in the unit in 1967 prior to November 17 (45 weeks) to the number of weeks in the year (52 weeks). Subsequently the Publisher also made known that for the base year 1968 it intended to pay only 5/12 of the normally computed vacation, that being the ratio of the number of months the Free Press was published and the employees worked in 1968 (5 months) to the number of months in 1968 (12 months).

The Union protested, and in due course the issue here to be decided was framed and submitted to me.

In its Brief the Union describes the issue in these words:

> "Whether the Publisher violated Article IV, Section 1 of the current collective agreement by failing to credit regular full time employees with 'service' time for the period November 17, 1967 to August 6, 1968 in connection with vacation benefits paid in 1968 and payable in 1969?" (Page 16)

The Publisher's Brief says:

> "Stated briefly, the issue in this case is whether or not the Teamsters employed by the Free Press who did not work during the entire period of the suspension-strike should nevertheless, receive vacation credits represented by this period of time. Actually there are two separate periods to be considered...the 1968 vacations based upon credits earned in 1967, and the 1969 vacations based on credits earned in 1968." (Page 4)

The Publisher and the Union have both emphasized that the issue is to be decided as a matter of contract interpretation and application. This proceeding is in the nature of a grievance arbitration, not an arbitration to fix the terms of a new agreement, or to settle the matter "equitably" or "reasonably". The applicable contract language is found in the 1965-1967 Collective Agreement which expired on November 17, 1967. It provided for vacations as follows:

"ARTICLE IV

"Vacations shall be on the basis of eligibility as follows:

"Section 1. Regular full-time employees who have completed the following periods of continuous service by December 31 of the preceding calendar year shall be entitled to vacations as follows:

"Period of Service	Vacation
1 year but less than 3 years	2 weeks
3 years but less than 5 years	3 weeks
5 years or more	4 weeks

"Section 2. Regular full-time employees who will have completed less than one (1) year of continuous service by December 31 of the preceding calendar year, and part-time, temporary or extra employees shall accumulate

vacation credits in the preceding calendar year to be liquidated in the following calendar year as follows:

"Period Worked	Vacation
208 hours straight time	1 day

"Thereafter, one (1) day for each subsequent two hundred eight (208) straight-time hours or major fraction worked.

"Employees who have not been full-time workers during their employment period, but who have been available at all times for work can accumulate credits for a three (3)-week vacation in the following manner: Each year represents 2,080 straight-time hours. When these employees have worked 6,240 straight-time hours, they will be eligible for a three (3)-week vacation.

"Section 3. Vacation shall be taken at the convenience of the Publisher with pay at the employee's regular rate as averaged for the eight (8) weeks preceding such vacation. Overtime paid for time over forty (40) hours in any week shall not be considered. Each employee in Classifications E, L, N, and O (ARTICLE VII) who is qualified for a vacation shall receive vacation pay at his weekly net salary as reported for Social Security accounting averaged for the eight (8) weeks preceding his vacation. For exceptions to this Section, see ARTICLE IV, Section 7.

"Section 4. Vehicle allowance, if any, shall not continue during vacation period for any employee.

"Section 5. Employees will be allowed to pick their vacation times by seniority on a year-round basis.

"Section 6. A regular employee on leave of absence shall only accumulate vacation credits on a pro-rata basis for the time actually worked during the year or years in which the leave is taken.

"Section 7. Vacation pay for a Reliefman shall be at the average earnings for the preceding year but not less than the Reliefman's minimum wage."

That language was carried forward without change into the current agreement, which by force of the June 18, 1968 Settlement Agreement became effective for three years from August 5, 1968, the date publication resumed. Except for changes which are not now relevant, the quoted vacation language has appeared in previous collective bargaining agreements for about 15 years past.

The Union's principal arguments are these:

a) Section 1 of Article IV of the Agreement governs the computation of vacations for regular full time employees having more than one year of continuous service. Section 2 of that Article applies to other regular full time employees and to part time, temporary or extra employees. While Section 2 provides that vacations in one year shall be fixed by reference to the accumulation and liquidation of "credits" bases on hours worked in the preceding year, Section 1 does not. Employees in the category encompassed by Section 1 are entitled to vacations based only and entirely upon their completion, by December 31 of the preceding year, of the scheduled "periods of continuous service". The employees here involved are these who qualified for vacations under Section 1, and the prorating of "credits" is not relevant or applicable to them.

b) The form and content of Article IV, past practice by this Publisher, and decisions by various arbitrators, all compel the conclusion that time not worked because of interruptions in publication due to strikes does not break a period of continuous service. Therefore employees covered by Section 1 of Article IV may not properly be deprived of their full vacation benefits as therein defined. The Arbitrator ought not by interpretation inject a new and additional condition precedent to vacations which clearly is contradicted by the language and past practical administration of Article IV, Section 1.

c) There is no merit in the Publisher's contentions that the hiatus between the 1965-1967 and 1968-1971 contracts (i.e. from November 17, 1967 to August 5, 1968) defeats the Union's claim, because (1) the language of the current Collective Agreement does not require that "service" must be completed during the term of a Labor Agreement, (2) the Publisher recognized as "service", time worked by supervisors (who are represented by the Union) during that hiatus, and (3) the past practice with respect strike shutdown situations at the Free Press has been to include time not worked by employees in the Teamster's unit as continuous service.

d) The fact that the Union has filed with the NLRB unfair labor practice charges against the Publisher based on events which occurred in the 1967-1968 labor dispute does not militate against the Union's position in this arbitration. The questions raised before the NLRB are statutory. The questions here to be decided are contractual. It is well established that the jurisdiction and responsibilities of arbitrators are not affected by recourse to the NLRB by a party to arbitration proceedings.

The Publisher's principal arguments are these:

a) The contract does not require the payment of full vacation credits under the circumstances of this case, because such credits are a form of deferred compensation based upon work performed and pay received during the preceding calendar year.

b) While it is undisputed that in many work stoppage situations which occurred at the Free Press between 1957 and 1967, employees in the Teamster's bargaining unit were granted vacation credits for the period of the shutdown, there are a number of differences between those situations and the one involved in this dispute. First, in four of them, 1957, 1958, 1961 and 1962, the duration of the shutdown was so short as to have little effect on vacation credits. They were de minimis. Second, for the periods of the 1955 strike (46 days), the 1962 strike (30 days) and the 1964 strike (131 days) the subsequently executed new collective agreements were given retroactive effect to the date of expiration of the former contract. Except for the 1967-1968 situation here involved, there never was a time when employees in the Teamster's unit were not covered (if not prospectively, then retroactively), by the terms of an agreement.

By contrast, in the 1967-1968 situation the old Teamster-Free Press contract expired on November 15, 1967, and the new one became effective, without retroactive application, on August 5, 1968. Accordingly for the period for which the Publisher did not grant vacation credits, there was no contract in effect.

c) Under the Agreement there are several kinds of situations where employees with more than one year of continuous service receive only pro rata vacation credits. In addition to leave of absence situations expressly covered by Section 6 of Article IV, vacation credits have been customarily prorated by the Publisher (and accepted without protest) for employees who are discharged, or quit, or die, or go on military leave during the years preceding their vacation. Similarly, employees on paid sick leave during such year have been given vacation credits only at the rate (full pay or half pay) they were paid while on such sick leave.

d) "Service" for purpose of computing vacation benefits is different from "service" for purpose of bidding. Most arbitrators regard paid vacation as form of deferred compensation predicated on, and therefore properly computed by reference to the amount of, work performed or pay received in a preceding base period. The Union has indicated in this case and elsewhere that it regards paid vacation as an "earned benefit". It cannot be reasoned that an employee earns anything while he is

neither working for nor being paid by his employer. Accordingly, the concerned employees did not earn vacation credits from the Free Press during the November 1967-August 1968 strike-suspension period.

e) There is no merit in the Union's argument that since 1955 the Publisher has interpreted the contract to mean that employees are entitled to vacation credits for time they were furloughed during a shutdown. The Publisher's actions of paying full vacation benefits during that time constituted a unilateral grant, not required by the contract or supported by any negotiation or discussion between the Union and the employer.

f) The interpretation for which the Union contends is inequitable, unreasonable and unjust. It would give more favored treatment to employees who lost work by reason of a suspension-strike than to those who lost work by reason of a recognized leave of absence.

Numerous arbitration decisions have been cited to me. I have examined them with interest, but in view of the fact that none of them involved the parties to this proceeding I deem it unnecessary to discuss them, and in the interest of brevity refrain from doing so.

Discussion and Conclusions

In view of the stipulation that decision turns upon the interpretation and application of the terms of the Agreement, I am constrained to hold in favor of the Union. My reasoning may be explained as follows:

While it is true in a broad sense that paid vacations are in the nature of deferred earned benefits, the conditions on which vacation benefits become due in the first place, and the extent and limits of such benefits, are in all respects controlled by the terms of the contract between the Publisher and the Union. The concept of "earned benefits" can be relied on to correlate vacation time or pay with the nubmer of weeks worked in the preceding year only to the extent that such correlation is required by or is consistent with the terms of the Agreement as fairly construed. If, as the Union contends, the Agreement means that vacation time and pay as therein defined is due to employees who have completed periods of "continuous service" as of December 31, the Publisher is in a weak <u>contractual</u> position to argue that it may withhold some portion of those vacations because of circumstances which do not defeat fulfillment of the stated conditions. The Publisher's emphasis on "earned benefits" seems to me to be an appeal to equitable considerations which would be much more persuasive if these proceedings constituted an "interest arbitration".

In my considered opinion the Agreement cannot fairly be construed to mean that vacations may be prorated in the circumstances of this case, because: First, Section 1 of Article IV, unlike Section 2 does not predicate the length of vacations on the accumulation of "vacation credits". The text of Section 2 domonstrates that the parties knew how to fix vacations on an accumulated credit basis and their omission to express themselves in Section 1 in words similar to Section 2 must be regarded as a clear indication that they intended a different concept would apply to employees covered by Section 1. My conclusion on this point is strengthened by the fact that insofar as regular employees "on leave of absence" are concerned, the parties wrote a specific vacation prorating rule into Section 6 of Article IV. Had it been their intention to create such a rule for employees who did not work because of a suspension-strike situation such as is here involved, a few words added to Section 6 would easily have expressed it.

Second, any doubt as to the meaning of Section 1 that might remain in one's mind after study of the language of all of Article IV is completely dispelled, in my opinion, by the evidence of past practical applications of the Agreement. The evidence is so clear to the effect that on prior similar occasions the Publisher did <u>not</u> prorate vacation benefits that the Publisher is constrained to argue that its actions on those occasions should here be regarded as mere unilateral grants of benefits, and not as evidence of a practical contract interpretation. I see no strength whatsoever in that argument. There is no proof that when in the past the Publisher gave full vacations to employees who did not work during strikes it simultaneously voiced an assertion that it was extending to them a gratuity for which it was not obligated by contract. Normally a party to a contract behaves in accordance with his belief as to its meaning, and I think the burden was on the Publisher to make it promptly clear to the Union if its belief as to meaning differed from its behavior with respect to granting vacation benefits.

The Publisher emphasizes a distinction between the present circumstances and those which prevailed in prior suspension-strike shutdowns: That the new (1968-1971) contract was not made retroactive to the date of termination of the expired (1965-1967) contract. It is true that there was no Labor Agreement in effect on December 31, 1967, the controlling date for determining the continuous service status for 1968 vacations. (See Article IV, Section 1). But the absence of a Labor Agreement from November 15, 1967 to August 5, 1968 was never regarded by either the Publisher or the Union as a termination of employment or continuous service. The Publisher's posted announcement of November 17, 1967, previously quoted, clearly indicates the contrary.

During the hiatus between contracts, the Publisher was contractually obligated only to the extent established by former contracts. In this arbitration it might have been argued, as in some of the cited arbitration cases it was argued, that the Publisher had no obligation whatsoever for 1968 vacations predicated on continuous service status as of December 31, 1967 because no contract was in effect on that date. The Publisher never said that it was taking that position during new contract negotiations however and does not advance that argument now. Moreover the Publisher executed a new contract with the Union on August 5, 1968, which contract restates the obligation for vacations set forth in the former contract. In submitting this case the Publisher does not deny that under the 1968 contract it has some obligation for vacations based on continuous service status held at December 31, 1967. The only issue it raises is whether that obligation is for a full vacation or a pro rata vacation. For the reasons herein recited I hold that it is obligated for full vacations, but I stress that such holding is reflective of the arguments here advanced, not those advanced in other cases by other parties.

Other points advanced by the parties have been considered by me but I do not deem it necessary to extend this opinion to discuss them. The 1967-1968 suspension-strike situation was a complex and difficult one, but I am not called upon to, and in the frame of reference of this case properly may not, assess the pros and cons of the parties behavior with respect to it. The Free Press-Teamster Agreement largely speaks for itself on the point in dispute, and any uncertainty in the language must be resolved in the Union's favor by the practical interpretation placed on it by the parties in prior years. The Agreement language, the past practical interpretation, and the fact that the dispute was submitted as entirely a matter of contract interpretation distinguish this case from other arbitration decisions cited and in my opinion command the result for which the Union contends.

Decision

Under the Agreement it was improper for the Publisher to prorate vacations for 1968 and 1969 for full time regular employees merely because they lost time at work during the 1967-1968 suspension-strike.

/s/ Gabriel N. Alexander
Gabriel N. Alexander, Arbitrator

May 19, 1969